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Tamara R. Piety

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TAMARA R. PIETY\*

## The First Amendment and the Corporate Civil Rights Movement

### INTRODUCTION

THE LAST 20 YEARS have seen the development of a remarkable expansion of the First Amendment to business enterprises. The First Amendment has become a powerful weapon against regulation of all kinds. Regulations that have been on the books for decades are being challenged.<sup>1</sup> And many regulations that have been a thorn in the side of business, and the source of much litigation, are now under a constitutional cloud.<sup>2</sup> Moreover, the arguments on which this robust First Amendment rests have given rise to a number of additional claims for constitutional protection for business entities, claims that only a few years ago would have seemed “off the wall,”<sup>3</sup> such as, that a corporation has a free exercise of religion claim under the First Amendment. This phenomenon, of expanding protection for corporations, is part of a global trend to leverage human rights for the benefit of business.<sup>4</sup>

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\* Phyllis Hurley Frey Professor of Law University of Tulsa College of Law and Affiliated Scholar at the Information Society Project at Yale Law School. I thank the students at the University of Maryland’s Journal of Business & Technology Law for inviting me to speak at their 2015 Spring Symposium.

1. See, e.g., *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014) (state licensing requirement dating back to 1921 was subjected to First Amendment challenge but ultimately upheld).

2. See, e.g., *NAM v. SEC*, No. 13-5252, slip op. at 5–6 (D.C. 2015) (dismissing dissent’s observation that securities laws have a number of disclosure requirements which had not been thought, heretofore, to raise a First Amendment issue, that this was an argument that “whatever is right” and that such an argument was both “lazy” and meant that one could never determine that a practice was wrong).

3. This is a regular feature of constitutional adjudication. “Opinions and views that were once ‘off-the-wall’ later become orthodox, and the settled assumptions of one era become the canonical examples of bad interpretation in another. Canonical cases, ideas, and doctrines soon become anti-canonical, completely reinterpreted, or merely forgotten.” JACK BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 1* (2011). Nevertheless, it is striking whenever such a movement takes place within such a short period. The mere fact of such a paradigm shift does not, of course, mean that it is wrong. However, since in a common law system the mere fact that something has been done a certain way in the past is a *legitimizing* fact and, indeed, is sometimes treated as the definitive, or compelling, fact, such a shift is always difficult to square with *stare decisis* and may generate a perceived legitimacy crisis and cries of “judicial activism.” See, e.g., Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485 (2012).

4. See, e.g., ROGER A. SHINER, *FREEDOM OF COMMERCIAL EXPRESSION* (2004). The pendulum appears to be swinging back to, if not fully resurrect the *Lochner* doctrine, to at least reinterpret or rehabilitate it via the First

## THE FIRST AMENDMENT AND THE CORPORATE CIVIL RIGHTS MOVEMENT

In many ways this trend has been a boon to business. Expanded First Amendment protection for business communications can mean less red tape, fewer disclosures, and less governmental oversight, since almost any sort of business activity can be recast as an expressive activity in order to fit it in under the First Amendment. However, as I wrote in, *Brandishing the First Amendment: Commercial Expression in America*,<sup>5</sup> this expansion has not been such a good development for public health, safety and welfare.<sup>6</sup> Moreover, I am not sure that, at the end of the day, it is such a good development for business either. A promotional free-for-all is actually not all that desirable for business. While too much regulation is self-evidently a bad thing,<sup>7</sup> no regulation at all may be just as bad.<sup>8</sup> Only time will tell whether this new First Amendment will result in the wholesale deregulation the case law would seem to support, or whether courts will decline the invitation to reinterpret the government's power to regulate commerce.<sup>9</sup>

In the meantime, what we confront today is a very robust conception of corporate personhood undergirding this new First Amendment. This robust conception of corporate personhood has given rise to something that looks very much like a civil rights movement for corporations.<sup>10</sup> If that strikes you as bizarre—that we could actually be analogizing giant corporations like Exxon-Mobil or Apple,

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Amendment. See, e.g., Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. FORUM 165 (2015).

5. TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT (2012).

6. See, e.g., *id.* at 220 (arguing that an economy dependent upon high levels of consumption, consumption fueled in part by promotional activities, probably contributes to environmental problems).

7. See generally *Over-Regulated America*, THE ECONOMIST (Feb. 18, 2012), <http://www.economist.com/node/21547789>.

8. Businesses may actually benefit from some regulation. See PIETY, *supra* note 5, at 186–201; For one thing, regulation can offer stability in an otherwise volatile market. See Michael R. Siebecker, *Corporate Speech, Securities Regulation, and Institutional Approach To The First Amendment*, 48 WM. & MARY L. REV. 613, 648–649 (2006) (positing that some speech regulation may be warranted in order to facilitate institutional stability). And businesses would presumably still like to be able to sue competitors for false claims under the Lanham Act. See, e.g., *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014) (POM Wonderful, LLC, a seller of pomegranate juice, sued Coca-Cola Co. under the Lanham Act, 15 U.S.C. § 1125 (2012), alleging that when Coca-Cola advertised a drink as “pomegranate-blueberry” which only contained 0.3% pomegranate and 0.2% blueberry it injured POM's business.). At least in theory, this new, more expansive First Amendment jurisprudence could make such claims unconstitutional.

9. There is some indication that at least some courts, when faced with a claim, based on the First Amendment and challenging longstanding statutes, have simply declined the invitation to find them unconstitutional. See *Liberty Coins*, 748 F.3d 682 (6th Cir. 2014). But for the most part they have done so without much explanation distinguishing the case before the court from the recent Supreme Court precedent. See *id.* at 697.

10. See Susanna Kim Ripkin, *Corporate First Amendment Rights After Citizens United: An Analysis of The Popular Movement To End The Constitutional Personhood of Corporations*, 14.1 U. PA. J. BUS. L. 209, 223 (2011) (“For the first fifty years after the adoption of the Fourteenth Amendment, more than fifty percent of the Supreme Court cases applying the Fourteenth Amendment involved corporations, and less than one half of one percent involved race discrimination claims. The Supreme Court repeatedly confirmed corporations were persons within the meaning of equal protection clause of the Fourteenth Amendment and thus paved the way for corporations to gain additional constitutional rights.”).

to the people who struggled, at the risk of their lives, for the right to vote<sup>11</sup> and for equal treatment under the law — you are not alone. Yet that seems to be what is happening: the rhetoric of civil rights and equality is being mobilized on behalf of business corporations.

Under this new First Amendment, it is potentially discriminatory to single out marketing<sup>12</sup> for different treatment than applies to other speech, or to apply different rules to different types of businesses, or to business corporations versus human beings or non-profits.<sup>13</sup> Under this new First Amendment distinctions between corporations and human beings are apparently invidious. I wrote about this phenomenon in 2012 in *Brandishing the First Amendment* and I think we will see it expanding even further than I predicted then.

In this brief essay, drawn from my remarks at the conference, I will explain how I think this robust form of corporate personhood emerged from the commercial speech doctrine and how the rationale for the commercial speech doctrine — consumer protection — has been turned on its head. Today, this new First Amendment, rather than protecting consumers is being used as a weapon *against* consumer protection.<sup>14</sup> That this is a bad development for consumers is obvious. What is less obvious is that it might also be a bad development for business. The new First Amendment may be leading American business to a place it does not really want to go. This second point however is one I don't attempt to explore. What I can do is offer a hypothesis, a road map, of how we got here. This map

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11. *But see id.* at 246 (noting that in *Citizens United* the Supreme Court did not hold that corporations are entitled to vote, the paramount right sought in the Civil Rights movement).

12. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663 (“On its face, Vermont’s law enacts content-and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. . . . The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers.”). The proposition that this quote sets forth is just untenable. It makes the commercial speech doctrine itself unconstitutional. *See Tamara R. Piety, “A Necessary Cost of Freedom”?: The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1 (2012). It would also, if taken literally, render many other laws unconstitutional. For example, the securities disclosure laws target certain topics (content) and certain speakers (issuers of securities); tobacco labeling laws require specific information about health risks (content) from specific speakers (sellers of tobacco); food labeling laws prescribe certain content, ingredients, calories, country-of-origin, etc. (content) from specific speakers (sellers of food), and so forth. *Id.*

13. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769 (2014) (“No known understanding of the term ‘person’ includes *some* but not all corporations.”).

14. The First Amendment has been used to argue against efforts to restrict the marketing of junk food to kids. *See, e.g., MARTIN H. REDISH, CHILDHOOD OBESITY, ADVERTISING AND THE FIRST AMENDMENT* (2011), [http://www.gmaonline.org/file-manager/Health\\_Nutrition/childhood\\_advertising\\_firstamendment.pdf](http://www.gmaonline.org/file-manager/Health_Nutrition/childhood_advertising_firstamendment.pdf) (discussing FTC Project No. P094513, Interagency Working Group on Food Marketing to Children: General Comments and Proposed Market Definitions); Kathleen M. Sullivan, *The Interagency Working Group’s Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulation Efforts: Constitutional Issues*, Appendix A to Comments of Viacom Inc. (July 14, 2011), [https://www.ftc.gov/sites/default/files/documents/public\\_comments/preliminary-proposed-nutrition-principles-guide-industry-self-regulatory-efforts-project-no.p094513-7884/07884-80045.pdf](https://www.ftc.gov/sites/default/files/documents/public_comments/preliminary-proposed-nutrition-principles-guide-industry-self-regulatory-efforts-project-no.p094513-7884/07884-80045.pdf). It has also been used to strike down the new, demonstrably more effective, warning labels on cigarettes. *R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, 696 F.3d 1205 (2012).

suggests that what started out as a modest, limited expansion of the First Amendment for some commercial advertising has slipped its moorings and become a powerful, free floating weapon that can be deployed against the regulation of business more generally.

### I. THE COMMERCIAL SPEECH DOCTRINE AND ITS EARLY JURISPRUDENCE

We begin with the commercial speech doctrine. The commercial speech doctrine is a special subset of First Amendment law which covers commercial speech.<sup>15</sup> No one knows exactly what commercial speech is,<sup>16</sup> but it is almost certainly advertising.<sup>17</sup> And before 1976, most scholars, judges and lawyers thought that advertising was not covered by the First Amendment. Indeed, in 1942 the Supreme Court had unequivocally stated that it wasn't.<sup>18</sup> But between 1942 and 1976 the Court decided cases involving ads—political ads,<sup>19</sup> classified ads,<sup>20</sup> ads for abortion services<sup>21</sup>—in which the Court held that the speech in question was protected.<sup>22</sup> But it was not clear if these holdings represented exceptions to the categorical exclusion of advertising from First Amendment protection, or if they signaled a new attitude toward advertising. Soon, it became apparent that it was the latter.<sup>23</sup>

#### A. *Advertising Protections in Virginia Pharmacy*

In 1976, in a case subsequently known as *Virginia Pharmacy*,<sup>24</sup> the Supreme Court resolved the ambiguity about the constitutional protection for commercial speech in favor of some First Amendment protection for advertising.<sup>25</sup> The case involved a Virginia law which prohibited pharmacists, as a matter of professional ethics, from engaging in price advertising.<sup>26</sup> The rationale for the law was that price advertising could ultimately undermine customer service if a destructive price war broke out.<sup>27</sup> And because prescription drugs implicate life and death, professionalism and

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15. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000).

16. See, e.g., Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE WEST. RES. L. REV. 1143 (2004); James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 CASE WEST. RES. L. REV. 1091 (2004).

17. Post, *supra* note 15, at 5.

18. *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942) (“We are equally clear that the Constitution imposes no such [First Amendment] restraint on government as respects purely commercial advertising.”).

19. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

20. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973).

21. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

22. See *supra* notes 19–21.

23. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 759 (1976) (alluding to the end of an era of unprotected commercial speech).

24. *Id.*

25. See *id.* at 770.

26. *Id.* at 749–50.

27. *Id.* at 767.

service in the delivery of pharmacy services could be important.<sup>28</sup> What this meant in practice was that pharmacies couldn't advertise drug prices.<sup>29</sup> A consumer group brought a lawsuit to challenge this law claiming that it violated consumers' First Amendment rights as listeners.<sup>30</sup> The First Amendment, they argued, protected their right to hear truthful price information.<sup>31</sup>

This argument generally tracked the argument made by Professor Martin Redish and others that exclusion of advertising from First Amendment protection could not be justified on the grounds that advertising was somehow less important than other speech, or involved less important concerns.<sup>32</sup> To the contrary, Redish argued, advertising spoke to people about some of the most pressing issues in their daily lives.<sup>33</sup> The Court agreed.

*Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.*<sup>34</sup>

However, the Court was also quick to note that “[i]n concluding that commercial speech . . . is protected, *we of course do not hold that it can never be regulated in any way.* Some forms of commercial speech regulation are surely permissible.”<sup>35</sup> It specifically mentioned four types of regulation as permissible.<sup>36</sup>

First, “time, place and manner restrictions” of advertising would be permissible.<sup>37</sup> (However, these types of restrictions might be constitutional with respect to any speech covered by the First Amendment, not just advertising.<sup>38</sup>)

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28. *Id.*

29. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 749–50 (1976).

30. Alan Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE W. RES. L. RES. 1189 (2004).

31. *Id.* at 1192. Brief of Appellees at 19–20, Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (No. 74-895), 1975 WL 173826, at \*14.

32. See generally Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

33. *Id.* at 445.

34. *Id.*

35. *Id.* at 770 (emphasis added).

36. *Id.* at 771–73.

37. *Id.* at 771.

38. *Id.* at 770.

The other three examples of permissible regulation, however, went to the heart of the distinction between the First Amendment as it would henceforth apply to commercial speech and its application to other protected speech.<sup>39</sup> “*The First Amendment, as we construe it today,*” the Court wrote, “*does not prohibit the State from insuring that the stream of commercial information flow [sic] cleanly as well as freely.*”<sup>40</sup> Also, warnings or disclaimers might be constitutional,<sup>41</sup> wrote the Court, and the usual prohibitions on prior restraints might be inapplicable.<sup>42</sup> These types of regulations, the Court said, would mostly be unaffected by the *Virginia Pharmacy* decision because of “common sense differences” between commercial speech and “other varieties.”<sup>43</sup> Most fundamentally, commercial speech could be regulated for its truth.<sup>44</sup> This distinguished it from almost every other category of protected speech.

These examples were not just hypothetical. Regulation of false advertising, the requirement of disclosures, certain types of labeling, and requirements for approval of labeling or some disclosures before dissemination of a product or marketing, all these categories corresponded to a great deal of then existing regulation, not just of advertising, but also of securities, labor law and other areas of business as well.<sup>45</sup> All these regulations might have been put into constitutional doubt if the *Virginia Pharmacy* ruling was read too literally or too broadly.

Although the majority opinion’s tone suggested its ruling simply brought First Amendment law into line with First Amendment principles,<sup>46</sup> in fact, without the exceptions the Court articulated, this new protection for commercial speech would, as Justice Stewart noted, call “*into immediate question the constitutional legitimacy of every state and federal law regulating false or deceptive advertising.*”<sup>47</sup> That was precisely why he felt it necessary to write a separate opinion, to explain why he thought the decision did *not* preclude such regulation.<sup>48</sup>

Justice Stewart thought those “common sense differences” between commercial speech and “other varieties” that the majority mentioned were that, although, in many areas false speech got *some* protection, this protection was not offered to speech for its *own* sake, but rather because there was no practical way of regulating false speech without unduly chilling protected expression and that, with respect to

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39. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–74 (1976).

40. *Id.* at 771–72 (emphasis added).

41. *Id.* at 771 n.24.

42. *Id.*

43. *Id.*

44. *Id.* (explaining that the nature of commercial speech necessitates a higher degree of scrutiny to ensure the truthfulness of the speech).

45. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

46. *Id.* (“It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.”).

47. *Id.* at 776 (emphasis added).

48. *Id.*

ideas, there was no such thing as a false idea.<sup>49</sup> In contrast, he wrote, commercial speech dealt mostly with facts, facts which were easy for the speaker to verify, facts which indeed the speaker might be in the best position to verify, and that it was, after all, only *truthful* commercial speech which would further the public interest the majority had identified – that decisions in the marketplace be well-informed ones.<sup>50</sup> “*There is . . . little need,*” he wrote, “*to sanction ‘some falsehood in order to protect speech that matters.’*”<sup>51</sup> Thus, at least in Justice Stewart’s mind, the *Virginia Pharmacy* decision rested critically on the proposition that it was acceptable for the government to regulate the truth of speech in the commercial context, in part because he thought there was no First Amendment value in false speech.<sup>52</sup> As it turned out, this proposition would be repudiated in the 21<sup>st</sup> century.<sup>53</sup>

Meanwhile, Justice Rehnquist writing in dissent, saw the same difficulty Justice Stewart identified, that the majority’s ruling might make vast swaths of existing law unconstitutional, but he was less sanguine that the reasoning Justice Stewart and the majority advanced was sufficient to support its decision.<sup>54</sup> Rehnquist warned that the majority decision seemed to signal a return to the days when the Court would substitute its judgment for the legislature’s on economic matters.<sup>55</sup> “While there is much to be said for the Court’s observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.”<sup>56</sup> He wrote:

*The logical consequences of the Court’s decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed. Under the Court’s opinion the way will be open not only for dissemination of price information but for active promotion of prescription*

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49. *Id.* at 777.

50. *Id.*

51. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 777–78 (1976) (emphasis added).

52. *Id.* at 780–81. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”).

53. See *United States v. Alvarez*, 132 U.S. 2537, 2545 (2012) (rejecting the proposition that there is never any First Amendment value in false speech).

54. See *Va. State Bd. of Pharmacy*, 425 U.S. at 787 (Rehnquist, J., dissenting) (“The Court insists that the rule it lays down is consistent even with the view that the First Amendment is ‘primarily an instrument to enlighten public decision-making in a democracy.’ I had understood this view to relate to public decision-making as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo.”) (citations omitted).

55. *Id.* at 781 (“In coming to this conclusion, the Court has overruled a legislative determination that such advertising should not be allowed. . .”).

56. *Id.* at 784.



*drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage. . . . This effort to reach a result which the Court obviously considers desirable is a troublesome one, for two reasons. It extends standing to raise First Amendment claims beyond the previous decisions of this Court. It also extends the protection of that Amendment to purely commercial endeavors which its most vigorous champions on this Court had thought to be beyond its pale.*<sup>57</sup>

Justice Rehnquist thought that the majority had simply replaced the need to distinguish between commercial and non-commercial speech with a new line-drawing exercise; now the courts would have to distinguish between *truthful* commercial speech (which was protected) and *non-truthful* or misleading commercial speech (which was not).<sup>58</sup>

Moreover, he feared that this new standard the Court announced would mean that such ads as this would be constitutional: “Don’t spend another sleepless night. Ask your doctor to prescribe Seconal without delay.”<sup>59</sup>

*Unless the State can show that these advertisements are either actually untruthful or misleading, it presumably is not free to restrict in any way commercial efforts on the part of those who profit from the sale of prescription drugs to put them in the widest possible circulation. But such a line simply makes no allowance whatever for what appears to have been a considered legislative judgment in most States that while prescription drugs are a necessary and vital part of medical care and treatment, there are sufficient dangers attending their widespread use that they simply may not be promoted in the same manner as hair creams, deodorants, and toothpaste. The very real dangers that general advertising for such drugs might create in terms of encouraging, even though not sanctioning, illicit use of them by individuals for whom they have not been prescribed, or by generating patient pressure upon physicians to prescribe them, are simply*

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57. *Id.* at 781 (emphasis added).

58. *Id.* at 787. In fact, it was even more complicated than that. In truth, there was no substitution of one question for the other. *Virginia Pharmacy* presented courts with an additional line-drawing exercise because the commercial/non-commercial distinction remained important because only truthful commercial speech received protection, but, non-truthful, *non-commercial* speech might *still* be protected pursuant to *New York Times v. Sullivan*, 376 U.S. 254 (1964). In *Sullivan*, Justice Brennan, writing for the Court, observed that some false speech would perforce have to be protected if freedom of expression were to receive the “breathing room” it required. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (noting that free speech needs “breathing room” from too strict truth tests). As Justice Stewart observed, this was not a standard heretofore applicable to commercial speech. So courts applying the new doctrine would have to first decide whether speech was “commercial” and then whether it was truthful, before knowing whether it received this new protection. *Va. State Bd. of Pharmacy*, 425 U.S. at 771–78.

59. *Va. State Bd. of Pharmacy*, 425 U.S. at 788 (Rehnquist, J., dissenting).

*not dealt with in the Court's opinion. If prescription drugs may be advertised, they may be advertised on television during family viewing time. Nothing we know about the acquisitive instincts of those who inhabit every business and profession to a greater or lesser extent gives any reason to think that such persons will not do everything they can to generate demand for these products in much the same manner and to much the same degree as demand for other commodities has been generated.*<sup>60</sup>

Justice Rehnquist also worried that advertising limits on certain products would be unconstitutional.

*Both Congress and state legislatures have by law sharply limited the permissible dissemination of information about some commodities because of the potential harm resulting from those commodities, even though they were not thought to be sufficiently demonstrably harmful to warrant outright prohibition of their sale. Current prohibitions on television advertising of liquor and cigarettes are prominent in this category, but apparently under the Court's holding so long as the advertisements are not deceptive they may no longer be prohibited.*<sup>61</sup>

*B. Protected commercial speech under Central Hudson's four-part test*

Despite Justice Rehnquist's misgivings and his prediction that the consequences of *Virginia Pharmacy* would be "far reaching," initially it did not seem that way. Although he proved correct that direct-to-consumer [DTC] advertising of pharmaceutical drugs would be introduced, that introduction did not come by way of a constitutional challenge, but through legislative enactments.<sup>62</sup> And although advertising for some products which had previously been more restricted, whether by informal agreement, industry norms or regulation, such as alcohol<sup>63</sup> or gambling, *did* expand, other regulation continued in force or even grew.<sup>64</sup> For example, the

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60. *Id.* at 788–89.

61. *Id.* at 789.

62. Francis B. Palumbo & C. Daniel Mullins, *The Development of Direct-to-Consumer Prescription Drug Advertising Regulation*, 57 FOOD & DRUG L.J. 423 (2002); Wayne L. Pines, *A History and Perspective on Direct-to-Consumer Promotion*, 54 FOOD AND DRUG L.J. 489 (1999).

63. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995) (holding that the information on beer bottle labels is constitutionally protected commercial speech).

64. See *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 329 (1986) (finding that casino gambling was legal, but advertising casino gambling was not). It is worth noting that Justice Rehnquist himself moderated his disapproval of the commercial speech doctrine when he wrote the majority opinion in *Posadas*, one of the few cases to uphold a restriction as constitutional.

scope of permissible tobacco advertising continued to contract as more information emerged about the deleterious health effects of smoking.<sup>65</sup>

What changed during this period were social attitudes about both advertising and about these activities and so that the laws permitting direct-to-consumer advertising of prescription drugs were legislatively enacted.<sup>66</sup>

It is hard to say why society changed, whether *Virginia Pharmacy* changed the society or whether the decision itself merely reflected changes that were already taking place. In many ways the latter seems more likely, but that is another discussion. But for all its contradictions and difficulties, the decision to offer some constitutional protection to advertising became further entrenched in 1980 in *Central Hudson Gas Co. v. Public Service Commission of New York*,<sup>67</sup> a case which formalized a four-part test under the commercial speech doctrine, a test which persists (at least nominally) until the present day.<sup>68</sup>

Under *Central Hudson*, in order to be protected, commercial speech must (1) involve a legal activity and not be misleading; then, in order for the regulation of that speech to be upheld, the regulation must (2) involve a “substantial government interest;” (3) “directly advance” that substantial interest; (4) and do so in a manner that is “not more extensive than is necessary to serve that interest.”<sup>69</sup> The *Central Hudson* test was deemed an “intermediate scrutiny” test; that is, it was not the strict scrutiny test so often said to be “fatal in fact” which ordinarily applied to speech protected by the First Amendment,<sup>70</sup> but neither was it the deferential, “rational basis” scrutiny which had long applied to most regulation of commerce.<sup>71</sup> Protection for commercial speech thus seemed to stabilize as a category of speech entitled to less protection than other political or artistic speech, which were subject to a strict scrutiny standard, but not governed by a standard so deferential to regulation that it amounted to no protection at all, as was the case in the period after *Valentine*.

For a long time after *Central Hudson* things jogged along pretty much as always, with few of the dire consequences predicted by Justice Rehnquist emerging. However, by the end of the century it was beginning to become clear to most

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65. See Public Health Cigarette Amendments of 1971, Pub. L. No. 91-222, § 6, 84 Stat. 87, 89 (1970) (amended 1982).

66. See Pines, *supra* note 62, at 492.

67. 447 U.S. 557 (1980).

68. *Id.* at 566.

69. *Id.*

70. Constitutional law scholar Gerald Gunther observed that strict scrutiny was “‘strict’ in theory and fatal in fact.” Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: in Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). For an empirical study of this proposition see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts*, 59 VANDERBILT L. REV. 793 (2006).

71. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (concluding that Congress only needs a “rational basis” to regulate interstate commerce).

observers that the supposedly intermediate scrutiny test of *Central Hudson* was becoming increasingly hard for the government to meet.<sup>72</sup> Indeed, almost nothing ever did. Case after case was brought and in each the regulation was struck down,<sup>73</sup> even regulation of tobacco advertising,<sup>74</sup> a product increasing subject to regulation.<sup>75</sup> At the century's close, some academics, and some advocacy groups, were arguing that commercial speech (and then later, corporate speakers generally) shouldn't be treated as a "second-class" level of speech and that it should receive full First Amendment protection.<sup>76</sup> This view had even gained an adherent on the Court.<sup>77</sup> Somehow the intermediate scrutiny test had morphed into a *de facto* strict scrutiny

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72. See, e.g., Ashutosh Bhagwat, *A Brief History of the Commercial Speech Doctrine (With Some Implications for Tobacco Regulation)*, 2 HASTINGS SCI. & TECH. L.J. 103, 108–113 (2010) (referencing cases in which the Court invalidated commercial speech restrictions).

73. For a discussion of these cases as the progression from a fairly uncontroversial, true intermediate scrutiny to something that looks like strict scrutiny in all but name, see David C. Vladeck, *Lessons From a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE WES. RES. L. REV. 1049, 1055–59 (2004). This picture is further complicated by the announcement of yet another standard, "heightened scrutiny," in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). As I discuss at some length in another article, I think heightened scrutiny will likely just be the same as strict scrutiny; moreover, in *Sorrell* the Court focused on "content neutrality," an approach that makes a hash of the commercial speech doctrine since, by definition, the doctrine deals with specific—commercial—content. See generally Piety, *supra* note 12.

74. See *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 566 (2001).

75. See, e.g., Bhagwat, *A Brief History of the Commercial Speech Doctrine*, *supra* note 72 (at 114–15 (providing examples of how regulators retain authority to restrict the tobacco advertising)).

76. There are too many articles, dozens, maybe tens of dozens, advocating for greater protection for commercial and corporate speech, and so it is impossible to list them all. But one of the most influential was Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990), perhaps because one of the authors was and is a federal judge. One of the earliest was authored by the man who had perhaps done more to establish the doctrine in the first place, Professor Martin Redish. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). Since writing the piece that seemed to have inspired the Supreme Court's decision in *Virginia Pharmacy* in the first place, see Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Piety, *supra* note 12, at 21–23 (discussing Redish's role), Redish has turned out a formidable stream of articles and white papers advocating on behalf of more First Amendment protection for commercial and corporate speech. See, e.g., Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998). He has been joined in this by several prominent lawyers in private practice whose practices involve advocating for such clients and who have also contributed law review articles which promote these views. See, e.g., Floyd Abrams, *Citizens United and Its Detractors*, 120 YALE L.J. ONLINE 77 (2010); Charles H. Moellenberg & Leon F. DeJulius, Jr., *Second Class Speakers: A Proposal to Free Protected Corporate Speech for Tort Liability*, 70 U. PITT. L. REV. 555 (2009); Bruce Johnson & Ambika K. Doran, *Amendment XXVIII? Defending Corporate Speech Rights*, 58 S.C. L. REV. 855 (2007); William A. Wines & Terence J. Lau, *Can You Hear Me Now? – Corporate Censorship and Its Troubling Implications for the First Amendment*, 55 DePaul L. Rev. 119 (2005) [note that the authors mean censorship of corporations not censorship by corporations]; Bruce E.H. Johnson & Jeffrey L. Fisher, *Why Format, Not Content, is the Key to Identifying Commercial Speech*, 54 CASE WES. RES. L. REV. 1243 (2004); Deborah J. La Fetra, *Kick It Up A Notch: First Amendment Protection for Commercial Speech*, 54 CASE WES. RES. L. REV. 1205 (2004); Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REG. 85 (1999).

77. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in the judgment) ("I would subject all of the advertising restrictions to strict scrutiny and would hold that they violate the First Amendment.").

test<sup>78</sup> without anyone being quite sure how it had happened. But I believe the answer lies in the argument that intermediate scrutiny represented a sort of “discrimination” against commercial speech. That argument came not from the commercial speech cases, but from another line of cases altogether.

C. *From Intermediate Scrutiny to Strict Scrutiny in Bellotti*

Only two years after *Virginia Pharmacy* another First Amendment case was decided which would have, I argue, a momentous impact on the development of the commercial speech doctrine but which was not itself a commercial speech case. That case was *First National Bank of Boston v. Bellotti*.<sup>79</sup> *Bellotti* involved a state law which prohibited a corporation from spending from its general treasury for political advertising which did not impact the corporation’s business.<sup>80</sup> The bank wanted to advertise against a proposed personal property tax.<sup>81</sup> Because the state’s attorney general had declared that the proposed ad would violate the law, the bank sought a declaratory judgment that the state law violated the First Amendment.<sup>82</sup> The trial court concluded that it did but the Court of Appeals reversed.<sup>83</sup> As framed by the lower courts, the issue the *Bellotti* Court confronted was “whether, and to what extent, corporations have First Amendment rights.”<sup>84</sup> This, the Supreme Court said, “posed the wrong question.”<sup>85</sup>

*The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question is not whether corporations “have” First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the law] abridges expression that the First Amendment was meant to protect. We hold that it does.*<sup>86</sup>

There are several things interesting about this formulation. First, the Court engages in a bit of sophistry here. Reformulating the question this way does not answer whether the First Amendment was meant to protect the political speech of corporations. The question was whether the identity of the speaker mattered where the speaker was a business corporation, or, to put it another way still, whether

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78. See Vladeck, *supra* note 73, at 1059.

79. 435 U.S. 765 (1978).

80. *Id.* at 767–68.

81. *Id.* at 770.

82. *Id.* at 769.

83. *Id.* at 767.

84. *Id.* at 775–76.

85. *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

86. *Id.*

corporate political speech was indeed part of the core speech the First Amendment was meant to protect. But framing it this way certainly made it seem as if the answer to the question posed was easy and self-evident.

The second thing that is interesting about this reframing is the way in which Justice Powell proposes that freedom for corporate speech is predicated on a *public* interest.<sup>87</sup> Notice the way in which his framing of the question echoes the *Virginia Pharmacy* Court's concern about the listeners' right to hear information.<sup>88</sup> But there are significant differences between the two situations. It is easy to see how *truthful* commercial speech could conceivably represent a public benefit.<sup>89</sup> Obviously, false commercial speech is not in the public interest. And the *Virginia Pharmacy* Court conspicuously and scrupulously reaffirmed the power of the government to make sure that commercial speech was in fact truthful.<sup>90</sup> But truthfulness is precisely what the government may *not* regulate in the political sphere. While false political speech may be just as deleterious, perhaps more so, to the public than false commercial speech, it is quite a different matter for the government to propose to regulate false political speech. But it is one thing to say that the government ought not to be the arbiter of truth and falsity in the sphere of political speech; it is another thing to characterize *all* political speech as a public benefit, regardless of whether it is true, yet that seems to be what Justice Powell is suggesting.

It is harder still to swallow the proposition that the political speech of a corporation represents a public benefit. It may be that the speech of individuals and of political parties has at least a claim to being a "benefit" in that such speech is constitutive of a democracy.<sup>91</sup> It is much less clear that *corporate* political speech is a necessary or constitutive part of a democracy. Corporations are not voters.<sup>92</sup> And certainly where the speech manifestly may *not* be tested for its truthfulness,<sup>93</sup> and

87. *Id.* at 790–92 (explaining that the public has the right to evaluate a source and make their own judgments).

88. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976).

89. *See, e.g., Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (noting that "[commercial] speech serves individual and societal interests in assuring informed and reliable decision making" (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 761–765)).

90. *See Va. State Bd. of Pharmacy*, 425 U.S. at 771 (noting that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974))).

91. *See* Jack Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression For the Information Society*, 79 N.Y.U. L. REV. 1 (2004) ("Probably the most important theoretical approach to freedom of speech in the twentieth century has argued that freedom of speech is valuable because it preserves and promotes democracy and democratic self-government.").

92. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 394 (2010) (Stevens, J., concurring in part and dissenting in part) ("In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. *They cannot vote or run for office.*") (emphasis added).

93. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth-whether

given that falsity and exaggeration is virtually the hallmark of political advertising,<sup>94</sup> it strains credulity to see corporate political speech as a public benefit.

Certainly the issue as it was presented to the Court—whether corporations, as such, given that they are not human beings or voters, are legitimate participants in the democratic process,—does not seem to be a question with such an obvious “yes.” If protecting the political speech of corporations represents a public benefit the argument that it is must rest on some notion that more protection for corporations means more protection for us all.<sup>95</sup> This is, of course, a classical fallacy of composition. Corporations and voters, or business corporations and political parties, are not similarly situated. It is not at all clear that that a principle which applies to people ought to apply to powerful, non-human entities, entities which threaten to dominate the political process by the sheer amount of the resources they have to devote to such speech. But even if we disregard the fallacy of composition and suppose that business corporations and people are similarly situated, so that the vindication of the rights of the one vindicates these rights for all others, this proposition is at best a rather abstract and ethereal benefit, one far away from the much more concrete benefit to the consumer of truthful, commercial information about products and services for sale.

Also, because the government cannot test political speech for its truth<sup>96</sup> one of the principal *limiting* features of the commercial speech doctrine, as articulated in *Virginia Pharmacy* and *Central Hudson*,<sup>97</sup> could be stripped away once this idea, that the First Amendment applied to corporations’ political speech on a basis of equality with human beings, gained ascendancy<sup>98</sup> And as discussed below, this is exactly what happened in *Sorrell* as we saw this sort of corporate civil rights language applied to the regulation of marketing.

In holding that the First Amendment applied to the bank, Justice Powell wrote:

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administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.”).

94. See Staci Liefkring, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After United States v. Alvarez*, 97 MINN. L. REV. 1047, 1047 (2013) (“[P]olitical advertising has become ‘dirty’ and full of false or misleading information.”).

95. See *United States v. Danielczyk*, 788 F. Supp. 2d. 472, 494 (E.D. Va. 2011) (“The Supreme Court’s logic [in *Citizens United*] was that because *Buckley* found that independent contributions by human beings do not corrupt, and because *Bellotti* held that ‘the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity,’ corporations cannot be banned from making the same independent expenditures as individuals.”) (internal citations omitted).

96. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (“Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.”).

97. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

98. See *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776–77 (1978) (suggesting that the type of speech being regulated is indispensable to the decision-making process in democracy and that, like individuals, corporations should be protected under the First Amendment).

*If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.*<sup>99</sup>

While this paragraph seems to offer unassailable logic, perhaps especially to those for whom a claim for equality is particularly resonant, it is, as noted above, resting on somewhat circular logic, perhaps intended to make the argument more appealing to those who would most ardently defend equal protection against racial and gender-based discrimination. Justice Powell's framing of the issue performs a sleight-of-hand: it makes the question presented below—"Whether, and to what extent, corporations have First Amendment rights?"<sup>100</sup>—and purports to replace it with a new one—"Is this the sort of speech the First Amendment was meant to protect?"<sup>101</sup> Except it is *not* a new one. It is really the same question – "Is speech by corporations the type of speech the First Amendment was meant to protect?" and answers that question by assuming that the question presented should be answered in the affirmative. In doing so Justice Powell invokes both notions of equal protection and the rationale used in *Virginia Pharmacy*, the listeners' interest in hearing speech, rather than the speaker's interest in speaking, for protecting speech.<sup>102</sup> We see this in his invocation of "decisionmaking" and the reference to "informing the public."<sup>103</sup>

One of the benefits of this strategy is that it takes the focus off of the speaker. There is no "because" offered in the opinion for why corporate speakers ought to be considered as contributing to public discourse on terms of equality with human beings or why a business corporation, which is not human and thus has no expressive interests of its own, and is also not a voter, must be a rights bearing entity in this context. Indeed, the opinion disclaims such an inquiry.<sup>104</sup> It may be that that discussion would result in a decision that corporations ought to be treated

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99. *See id.* at 777.

100. *Id.* at 775–76.

101. *Id.* at 776.

102. *Id.*; *see also* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means . . . Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated.") (emphasis added).

103. *Bellotti*, 435 U.S. at 777.

104. *Id.* ("In deciding whether this novel and restrictive gloss on the First Amendment comports with the Constitution and the precedents of this Court, we need not survey the outer boundaries of the Amendment's protection of corporate speech, or address the question of whether corporations have the full measure of rights that individuals enjoy under the First Amendment.") (emphasis added).



the same as human beings, but at least then the decision would be supported by an argument about the nature of their contribution or status in the polity, rather than assuming, without discussion, the very question presented. That discussion is elided in the claim that treating the speech of the corporation differently is somehow discriminatory.<sup>105</sup>

Yet just as there are differences between human beings and corporations that might be of significance for purposes of the First Amendment, so too are there distinctions we might want to draw between marketing campaigns and political campaigns. The most dramatic difference is that the government may regulate the former for its truth with something close to impunity,<sup>106</sup> but it may not regulate the latter at all for its truth<sup>107</sup>—or at least such was the law at the time *Bellotti* was decided. That distinction would make a very important difference if the reasoning announced in *Bellotti* were adopted in the commercial speech context. Yet that is just what happened. Although not right away.

At first *Bellotti*, like its predecessor *Buckley v. Valeo*,<sup>108</sup> seemed like a blockbuster. The *Bellotti* Court broke new ground that seemed to presage more expansive constitutional protection for business generally.<sup>109</sup> But this did not happen right away. And in fact, with respect to political speech, the Court seemed to back away from its most expansive position in *Bellotti* by later finding some restrictions on corporate political speech constitutional.<sup>110</sup> Yet in the meantime, *Bellotti* with its antidiscrimination rhetoric, was making its way into the motions and the briefs in commercial speech cases, and into law review articles of those who argued that

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105. See 15 U.S.C. §§ 52–55 (1994) (allowing FTC to regulate truth in advertising); 15 U.S.C. § 1125(a) (2012) (permitting corporate competitors to file suit against one another for false or misleading representation in commercial advertising or promotion).

106. *Bellotti*, 435 U.S. at 784 (“[Limiting corporate speech] amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.”).

107. Compare *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (“Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’”), with 15 U.S.C. §§ 52–55 (1994) (allowing FTC to regulate truth in advertising), and 15 U.S.C. § 1125(a) (2012) (permitting corporate competitors to file suit against one another for false or misleading representation in commercial advertising or promotion).

108. 424 U.S. 1 (1976).

109. *Id.* at 45 (“So long as . . . groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.”); *Bellotti*, 435 U.S. at 777 (“The inherent worth of the [political] speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual.”).

110. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

commercial speech ought to get full First Amendment protection.<sup>111</sup> What “full protection” means in this context is strict scrutiny and, despite assurances to the contrary, although fraud is exempted, strict scrutiny offers very little in the way of an obvious exemption for false and misleading commercial speech, categories far short of fraud, but clearly within the scope of the regulation the *Virginia Pharmacy* Court meant to permit.<sup>112</sup>

## II. JURISPRUDENCE APPLYING STRICT SCRUTINY TO COMMERCIAL SPEECH & THE IMPLICATIONS OF EXPANSIVE FIRST AMENDMENT PROTECTIONS FOR CORPORATIONS

The first expression of this anti-discrimination approach to commercial speech appeared in 1993 in *City of Cincinnati v. Discovery Network, Inc.*<sup>113</sup> where the Court struck down a regulation banning commercial newsracks for advertising flyers, but not newsracks for newspapers, on the grounds that that the regulation was not content neutral in that the distinction between the commercial and non-commercial content had no bearing on the issue the City was trying to address, litter and urban blight.<sup>114</sup> This introduced into the commercial speech jurisprudence something which had not been there before, the notion that subjecting commercial speech to additional regulation for no reason other than that it was commercial might be suspect.<sup>115</sup> Ostensibly the majority relied on the last two prongs of the *Central Hudson* test, claiming that the ban did not represent a good “fit” between the City’s goals and the means it had used to achieve them.<sup>116</sup> However, the City’s failure to justify its distinction seemed to be the key consideration.<sup>117</sup>

Still, the majority seemed to realize that its focus on content neutrality might pose a problem in the future, thus the Court cautioned that “our holding . . . is

111. See, e.g., *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 490–96 (1985) (advocating for full protection for corporate expenditures under the First Amendment) (citing *Bellotti*, 435 U.S. at 789–90).

112. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting) (“[T]he Court unlocked Pandora’s Box when it ‘elevated’ commercial speech to the level of traditional political speech by according it First Amendment protection in [*Virginia Pharmacy*]. . . . For in the world of political advocacy and *its* marketplace of ideas, there is no such thing as a ‘fraudulent’ idea. . . .”).

113. 507 U.S. 410 (1993).

114. *Id.* at 430–31.

115. *Id.* at 421 (1993) (“[T]he speech whose content deprives it of protection cannot simply be speech on a commercial subject.” (citing *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

116. *Id.* at 428 (“Because the distinction *Cincinnati* has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding, as did the two courts below, that the city has not established the ‘fit’ between its goals and its chosen means that is required by our opinion in *Fox*.” (citing *Bd. of Trs. v. Fox*, 492 U.S. 469 (1989) (holding that *Central Hudson* and other decisions require only a reasonable ‘fit’ between the government’s ends and the means chosen to accomplish those ends)).

117. *Id.* at 430 (“The regulation is not a permissible regulation of commercial speech, for on this record it is clear that the interests *Cincinnati* has asserted are unrelated to any distinction between ‘commercial handbills’ and ‘newspapers.’”).

narrow . . . we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsmakers. We simply hold that on this record *Cincinnati* has failed to make such a showing.<sup>118</sup> Again, although this holding signaled the beginning of a more skeptical view of commercial speech regulation when challenged,<sup>119</sup> there was no immediate change of the doctrine.<sup>120</sup> Rather, this case was the first indication of a steady increase in the degree of difficulty, so that by the new century it seemed possible to say, as many did, that the commercial speech doctrine's intermediate scrutiny looked a lot like strict scrutiny.<sup>121</sup>

This was made especially clear a decade after the *Discovery Network* case in *Nike v. Kasky* early in the new century.<sup>122</sup> Nike had been subjected to critical stories in the press regarding its labor practices.<sup>123</sup> In response, it had undertaken a PR campaign to convince the public that it was addressing these issues<sup>124</sup> or, even more significantly, that the criticisms were unfounded.<sup>125</sup> Pursuant to this PR campaign Nike executives wrote op-eds, letters were sent to Athletic Directors at several colleges, issue ads were run in various publications, etc.<sup>126</sup> In many of these statements Nike made assertions that Marc Kasky, a consumer activist, said were not true.<sup>127</sup> Kasky filed a law suit on behalf of the consumers of California alleging that Nike's misstatements of fact constituted violations of the California false advertising and unfair and deceptive business practices law.<sup>128</sup>

118. *Id.* at 428.

119. See, e.g., Vladeck, *supra* note 73. See also Andrew S. Gollin, *Improving the Odds of the Central Hudson Balancing Test: Restricting Commercial Speech as a Last Resort*, 81 MARQ. L. REV. 873, 889–90 (1998) (observing that while *Discovery Network* followed and “strengthened” the final two prongs of *Central Hudson* test, “[t]he Court’s application of the fourth prong in *Discovery Network* constituted a significant departure from the highly deferential approach of previous decisions”).

120. See Nicholas P. Consula, *The First Amendment, Gaming Advertisements, and Congressional Inconsistency: the Future of the Commercial Speech Doctrine after Greater New Orleans Broadcasting Ass’n v. United States*, 28 PEPP. L. REV. 353, 361 (2001) (acknowledging that *Discovery Network* represented a distinct application of the *Central Hudson* test, while it still followed the doctrine).

121. See Andrew J. Wolf, *Detailing Commercial Speech: What Pharmaceutical Marketing Reveals about Bans on Commercial Speech*, 21 WM. & MARY BILL RTS. J. 1291, 1308 (2013) (“*Discovery Network* . . . highlights the Court’s reluctance to follow its own established test and to engage in more rigorous scrutiny when a speech restriction bears less than a direct connection to the purported state interest.”).

122. 539 U.S. 654 (2003). I discuss this case at length in my article about the *Nike* case. See Tamara R. Piety, *Grounding Nike: Exposing Nike’s Quest for a Constitutional Right to Lie*, 78 TEMPLE L. REV. 151 (2005).

123. See generally Ronald K.L. Collins & David M. Skover, *The Landmark Free-Speech Case That Wasn’t: The Nike v. Kasky Story*, 54 CASE W. RES. L. REV. 965, 967 (2004).

124. *Id.* at 975–76 (citing Harvey Araton, *Athletes Toe the Nike Line, But Students Apply Pressure*, N.Y. TIMES, Nov. 22, 1997, at C3).

125. *Id.* at 975–76, 1011–12.

126. *Id.* at 975–76.

127. *Id.* at 971–72.

128. See *Kasky v. Nike, Inc.*, 45 P.3d 243, 247–48 (Cal. 2002). California’s unfair competition law defines “unfair competition” to include “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law].” CAL. BUS. &

In response, Nike moved for the dismissal of Kasky's suit arguing that all of its statements were protected by the First Amendment.<sup>129</sup> The trial court and a California court of appeals agreed;<sup>130</sup> but when the case reached the California Supreme Court that court found that it was possible that some of the speech in question was commercial and thus could be tested for its truth, so it reinstated Kasky's law suit and remanded the case for discovery.<sup>131</sup> Nike was understandably unhappy with this outcome and appealed that decision to the United States Supreme Court which agreed to take the case and to hear oral argument.<sup>132</sup>

Ultimately, the Court dismissed the case as cert. improvidently granted,<sup>133</sup> but not before it was possible to see through the briefs submitted by Nike and its amici that *Bellotti* was being used to support the proposition that the regulation of speech because it was commercial, or of a corporation because of its corporate status,<sup>134</sup> represented a sort of invidious discrimination.<sup>135</sup> Many of these briefs cited *Bellotti* as standing for this proposition and cited Justice Powell's famous line to that effect quoted above. It was as if the intervening case law<sup>136</sup> (which at that time was still good law) had never happened. That fact alone might have signaled which way the wind was blowing, since it is ordinarily bad form not to cite relevant contrary authority which is on point. But even more telling was that in the concurring and dissenting opinions to the decision that cert. had been improvidently granted, it was clear that several members of the Court were inclined to agree that Nike's speech was protected.<sup>137</sup>

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PROF. CODE § 17200 (West 1992) (added by Stats. 1977, c. 299, § 1, p. 1202, and amended by SB 1586, Stats. 1992, c. 430, § 2). At the time of this case, California's false advertising law made it "unlawful for any person, . . . corporation . . ., or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate . . . before the public in this state, . . . in any newspaper or other publication . . . or in any other manner or means whatever . . . any statement, concerning that real or personal property or those services . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Id.* § 17500 (added by Stats. 1941, c. 63, p. 727, § 1, amended by Stats. 1955, c. 1358, § 1, p. 2443; Stats. 1976, c. 1125, § 4, p. 5029; Stats. 1979, c. 492, § 1, p. 1660).

129. *Kasky*, 45 P.3d at 248.

130. *Id.* at 248–49.

131. *Id.* at 262–63.

132. Order Granting Certiorari, 537 U.S. 817 (2003).

133. *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003).

134. See, e.g., Brief for Respondent at 13, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2000 WL 1508256, at \*8 (citing *Bellotti* to support the proposition that "[b]ecause the right to speak and the value of the speech to the public do not depend on the status or viewpoint of the speaker, corporations are entitled to the same freedom of expression enjoyed by individuals").

135. See *id.* (noting that courts are not allowed to favor one side of public debate on the basis of whether the speaker is a corporation).

136. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

137. See *Kasky*, 539 U.S. at 656 (Stevens, J. concurring) (he was joined by Ginsburg, J. and Souter, J., arguing that although some of Nike's speech may not be commercial he agrees that cert was improvidently granted on

What emerged from *Nike*, and subsequently flowered in *Citizens United*,<sup>138</sup> was this notion that regulation of a corporation is somehow discriminatory and that similarly, regulation of commercial speech on different terms than that of other protected speech is likewise discriminatory.<sup>139</sup> Thus, we have the Court in *Citizens United* writing “the First Amendment stands against attempts to *disfavor certain subject or viewpoints . . .*” as well as disapproving “*restrictions distinguishing among speakers*, allowing speech by some but not others.”<sup>140</sup> The citation which follows this statement is to *Bellotti*.<sup>141</sup>

This is not so remarkable considering that a good deal of the opinion in *Citizens United* is taken up with the question of whether to overrule the cases decided after *Bellotti*, *Austin v. Michigan Chamber of Commerce*<sup>142</sup> and *McConnell v. FEC*,<sup>143</sup> which seemed to depart from it (which it did).<sup>144</sup> But if you think that it was a bad idea to overrule *Austin* and *McConnell* in the political speech context, *Citizens United* is bad enough; what was more disturbing was to see this reasoning show up in a commercial speech case in *Sorrell v. IMS Health, Inc.*<sup>145</sup> where the Court found that a law which prohibited the sale, for marketing purposes, of prescriber-identified prescription records from pharmacies to data mining companies constituted a burden on “disfavored speech by disfavored speakers.”<sup>146</sup> As I describe at length elsewhere, this argument, that a statute which treats marketing differently than other speech, is constitutionally infirm *on that ground*, makes a hash of the commercial speech doctrine because, by definition, the commercial speech doctrine is applicable only to a specific type of content – commercial content.<sup>147</sup> Since *Sorrell* we have seen this non-discrimination principle extended to the free exercise of religion (at least as a statutory matter) in *Hobby Lobby* and the content neutrality principle reaffirmed in *Reed v. Town of Gilbert*.<sup>148</sup>

Taken altogether I believe what these cases present is material from which the argument can be made, and is being made by corporate plaintiffs today in a variety

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jurisdictional grounds); *Kasky*, 539 U.S. at 665 (Breyer J., dissenting) (joined by O’Connor, J.) (disagreeing with the conclusion that cert was improvidently granted and arguing that some of Nike’s speech was protected).

138. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

139. *See id.* at 347, 365.

140. *Id.* at 340 (emphasis added).

141. *Id.*

142. 494 U.S. 652 (1990).

143. 540 U.S. 93 (2003).

144. *Id.* at 319 (“*Austin* was a significant departure from ancient First Amendment principles’ . . . [w]e agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*.” (quoting *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 490 (2007) (Scalia, J., concurring in part))).

145. 131 S. Ct. 2653 (2011).

146. *Id.* at 2663.

147. *See generally* Piety, *supra* note 12, at 15.

148. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015).

of cases,<sup>149</sup> that any sort of business activity is in fact an expressive activity entitled to First Amendment protection, such that any proposed regulation of that activity violates the protection for freedom of expression.<sup>150</sup> That puts a great deal of existing regulation, much of which has been deemed uncontroversial for decades, under a constitutional cloud. What we have seen, and what I think we will see for some time to come, is a piecemeal invalidation of laws that had previously been thought valid.<sup>151</sup>

But because there will be a strong (and I maintain appropriate) reluctance on the part of the courts to destabilize vast swaths of the regulatory state, many of the challenges will fail.<sup>152</sup> But they will likely fail without much more than an assertion that the particular subject in question is “different,”<sup>153</sup> that said law has been on the books for many years and cannot be challenged now. Lower courts will have to resort to these sorts of gambits because, until the Supreme Court clarifies its precedents and describes some boundaries to this antidiscrimination principle, its precedent seems to have very broad implications and the lower courts cannot simply disagree with it.<sup>154</sup> They must find a way to distinguish it. But that is becoming increasingly hard to do. It is difficult not to conclude that the Court may not have reckoned with where this line of argument would take us before it set off on this path. Yet, Justice Rehnquist mapped out that path very clearly, so perhaps we have to conclude that this is part of an intentional assault on the regulatory state. This new, more robust First Amendment does, just as Justice Rehnquist predicted, put a great deal of regulation in the crosshairs of its opponents.

## CONCLUSION

Whatever the motivations, the fact remains that what started out as a limited right to hear truthful information (but not false information and without any rationale for a speaker’s right to speak commercial information) has morphed into a right which resides primarily in the speaker, one that can be used to rebuff the consumer’s interest in blocking unwanted advertising and hearing truthful information. But it is a denatured sort of right. It is not one expressed in terms of

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149. See *id.* at 2232; *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784–85 (2014); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010); *Sorrell*, 131 S. Ct. at 2659.

150. *Reed*, 135 S. Ct. at 2231–32; *Hobby Lobby*, 134 S. Ct. at 2275–76, *Citizens United*, 558 U.S. at 365–66; *Sorrell*, 131 S. Ct. at 2680–71.

151. See *Citizens United*, 558 U.S. at 339; *Sorrell*, 131 S. Ct. at 2659.

152. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 786 (1976) (Rehnquist, J., dissenting) (discussing that intellectual property will limit the First Amendment rights of the speaker because a speaker cannot infringe on intellectual property rights, for example performing a play without proper licensing).

153. *Id.* at 786–88 (discussing the difficulties of distinguishing cases from each other and the difficulty of drawing a concrete line among cases by which lesser courts can adjudicate First Amendment cases with predictability).

154. *Id.* (commenting that the lack of clear rules will give little guidance to the lower courts).

the speaker’s right to speak, but rather in a rejection of discrimination, thus leaving the corporation as rights holder in the background and its bona fides, in terms of its claim, separate from its owners, shareholders, directors or managers, to First Amendment rights of all kinds, unclear.<sup>155</sup>

I remain concerned that this expansive First Amendment will prove to be an unworkable burden on beneficial regulation intended to protect public health, safety, and welfare. Corporate managers use other people’s money for the corporation’s political expression.<sup>156</sup> And in doing so they may be, at times, acting as bad fiduciaries for the shareholders.<sup>157</sup> Milton Friedman famously suggested that the only appropriate social welfare goal for a business corporation was for it to make money for its shareholders.<sup>158</sup> One reason for this was because of the inherent mushiness of a concept like “social responsibility”; would everyone agree what constituted it?<sup>159</sup> Injecting such amorphous goals into the corporation would likely be inefficient. One might think political goals would fall into this same category. But if it is inappropriate for a corporation to pursue various social welfare goals, it is less obvious that pursuing political ones will be. We can expect faithful fiduciaries to engage in naked rent-seeking on behalf of the corporation, but is that really the type of activity “indispensable to decisionmaking in a democracy”?<sup>160</sup>

As Friedman said;

*“On ground of political principle, it is intolerable that such civil servants [corporate executives engage in social welfare decision-making] –insofar as their actions in the name of social responsibility are real and not just window-dressing—should be selected as they are now. If they are to be civil servants, then they must be elected through a political process.”*<sup>161</sup>

Moreover, the directors of a corporation may be, as Friedman suggested, experts as running their companies, but that does not necessarily make them public policy experts.<sup>162</sup> *What they do know is what they would like the rules of the game to be in*

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155. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784–85 (2014) (holding corporations are “people” under the Religious Freedom Restoration Act, thus ensuring their constitutional rights to exercise religious choices).

156. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33.

157. *Id.*

158. *Id.* (“In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to their basic rules of the society, both those embodied in law and those embodied in ethical custom.”).

159. *Id.*

160. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

161. See Friedman, *supra* note 156, at 122.

162. *Id.*

*order for their businesses to be most profitable.*<sup>163</sup> And I rather fear that this entails not so much a commitment to freedom of expression, but a commitment to making a profit, so that we see fairly dramatic asymmetry in businesses' position on freedom of speech, depending on whether the "freedom" involves the company being able to market its product by saying anything that proves to be effective, regardless of its truth,<sup>164</sup> or it involves someone *else* being permitted to use the company's intellectual property in ways that the company finds uncongenial.<sup>165</sup> I see little evidence that corporations' commitment to freedom of expression extends to expansive fair use in copyright or trademark. I think we can expect to see, and have seen, companies lobby for extremely relaxed laws when it comes to disclosures and truth in advertising and extremely strict one when it comes to protecting intellectual property.<sup>166</sup>

It seems unwarranted to suppose that corporate speech will necessarily enlighten as much as it obfuscates. We have only to think of the tobacco companies' long, and for several decades successful, struggle to obscure the health consequences of smoking.<sup>167</sup> Similar efforts have been undertaken on the issue of climate change<sup>168</sup> and to rebut the data concerning the health consequences of the consumption of junk food.<sup>169</sup> It seems to me that this is a bad development for the public welfare. But it may also be a bad development for business.

Friedman suggested that business leaders could be "extremely farsighted and clearheaded in matters that are internal to their businesses" but "incredibly shortsighted and muddleheaded in matters that are outside of their businesses but affect the possible survival of business in general."<sup>170</sup> This new First Amendment jurisprudence may represent a case in point since business entities or professional groups like the U.S. Chamber of Commerce or the National Association of

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163. *Id.* (emphasis added).

164. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770–71 (1976).

165. *Spence v. Washington*, 418 U.S. 405, 417 (1974) (holding that the right of free speech is not absolute and even protected speech may be limited, that "citizens are not completely free to . . . infringe copyrights").

166. *See, e.g., Harper & Row v. Nation Enters.*, 471 U.S. 539, 569 (1985) (holding that publishing unoriginal news is not permitted under the First Amendment and carries with it significant market implications, this potential for loss of revenue is why corporations will push hardest for strict First Amendment protections for their IP).

167. *See Engel v. Liggett Group, Inc.*, 945 So. 2d 1246, 1276–77 (Fla. 2006); WORLD HEALTH ORG., TOBACCO INDUSTRY INTERFERENCE WITH TOBACCO CONTROL 4–5 (2008), [http://apps.who.int/iris/bitstream/10665/83128/1/9789241597340\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/83128/1/9789241597340_eng.pdf).

168. Daniel Levy & Daniel Egan, *A Neo-Gramscian Approach to Corporate Political Strategy: Conflicts and Accommodation in the Climate Change Negotiations*, 40 J. MGMT. STUD. 803, 804–05 (2003).

169. *See, e.g., Michael Moss, (Salt + Fat 2 / Satisfying Crunch) x Pleasing Mouth Feel = A Food Designed to Addict*, N.Y. TIMES MAG., Feb 24, 2013, at MM34 (discussing a speech by the VP of Kraft in which he parallels between the ill effects of cigarettes and the impact of fattening foods, and that the health impact on Americans rivals tobacco).

170. Friedman, *supra* note 156, at 123.



## THE FIRST AMENDMENT AND THE CORPORATE CIVIL RIGHTS MOVEMENT

Manufacturers seem to be driving much of the strategic litigation.<sup>171</sup> There may be no single thing that has contributed more to distrust in government than the *Citizens United* decision and the perception that government has become, as Donald Trump suggested, a pay-for-play system.<sup>172</sup> That sort of attitude toward government is not good for business, at least not in the long run, because such regimes tend toward fascism and repression and they lose the support of the people.<sup>173</sup> Ultimately, markets require stability; business needs governments to supply infrastructure.<sup>174</sup> The new First Amendment doctrine threatens that stability; it threatens to take us back to the days of little regulation and much more survival of the fittest in terms of product safety and the regulation of the market.<sup>175</sup> The crazy thing is that, as a country, we know how that worked out the first time.<sup>176</sup> It is surprising that anyone would want to take us back to the 19<sup>th</sup> century. But that seems to be where we are headed.

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171. See, e.g., *Nat'l Ass'n of Mfrs. v. SEC.*, 956 F. Supp. 2d 43, 46 (D.C. Cir. 2013) (typifying First Amendment action brought by both the U.S. Chamber of Commerce and the National Association of Manufacturers).

172. Fred S. McChesney, "Pay to Play" Politics Examined, with Lessons for Campaign-Finance Reform, *THE INDEP. REV.*, Winter 2002, at 346–48.

173. See *id.* at 361.

174. *Id.*

175. Joseph A. Page, *Consumer Involvement and the Consumer Product Safety Act*, 2 *HOFSTRA L. REV.* 605, 606–07 (1974).

176. *Id.*